cranes and trucks in Malaysia and as the accounts show — and the revenue does not dispute this — it was not an inconsequential sideshow but was its lifeblood. So there is no doubt that under Malaysian domestic law, ie the ITA, the rental income of the taxpayer is business income and not only rental income'.

There is no question in this appeal that the appellant was carrying on the business of letting out its cranes and trucks for hire and having regard to the overlapping principle propounded by the above authority the said income should under the ITA be characterized as 'gains or profits from a business' chargeable to tax under s 4(a). So the question I now have to address is whether the express provisions of para 2 of art VIII of the DTA can be called in aid by the respondent to displace the characterization according to the overlapping principle in order to bring into charge for Malaysian tax the said income on the ground that it is royalty although on the basis of the overlapping principle it is business income which is clearly not chargeable to tax by reason of para 1(a) of art IV.

The ITA is a taxing statute, an Act of Parliament for the imposition of income tax. The DTA, brought into effect by the Double Taxation Relief (Singapore) Order 1968, is an agreement for the avoidance of double taxation and prevention of fiscal evasion in respect of taxes on income. There is no question in this case of fiscal evasion. I agree with counsel for the appellant that the nature of the income has to be determined by the ITA and the law which charges it to tax also has to be the ITA and that only once these factors are established according to the Malaysian domestic law can the DTA be resorted to in order to determine whether relief is available. Relief in this case is then clearly afforded by art IV so long as the said income is regarded as business income under s 4(a). I therefore find myself unable to accept the contention of counsel for the respondent that the said income is chargeable to tax in Malaysia by reason of art VIII on the ground that it constitutes 'royalties' within the definition contained in para 2 of that article, in other words that the provisions of para 1 of that article that 'royalties' may be taxed in the Contracting State from which they are derived render the said income chargeable to Malaysian income tax. To do so would be not only to utilize the DTA to change the character of the said income from business income to that of royalties but also to treat the character of the DTA as that of a charging or taxing statute instead of an agreement for relief against taxation. In any event, I also agree with counsel for the appellant, as conceded by counsel for the respondent, that para 1 of art VIII is merely permissive in its terms; it envisages a situation in which 'royalties' within its definition, may not be subject to relief but does not, and in my judgment, cannot, by implication, impose a tax on income which is specifically afforded relief by art IV. Accordingly, I am of the opinion that the Special Commissioners were wrong in confirming the assessments raised by the respondent in this case. The appeal is allowed with costs.

Appeal allowed.

Solicitors: *KH Koh, Cheong & Kok.*

Reported by *PS Ranjan*

Public Prosecutor v Abdul Rahim bin Abdul Satar

HIGH COURT (KUALA LUMPUR) — SELANGOR
CRIMINAL APPEAL NO 52-20 OF 1988
WAN YAHYA J
4 NOVEMBER 1989

Evidence — Hearsay evidence — Document listing serial numbers of trap money — Whether police officer maker of document — Whether document inadmissible on ground that maker of statement not called

Criminal Procedure — Power of court to summon and examine persons — Witness not called by prosecution but made available to defence — Power of trial judge to call for witness's evidence under s 425 of Criminal Procedure Code — Whether usurpation of prosecution's power — Criminal Procedure Code (FMS Cap 6), s 425

The appellant was tried before the sessions court judge for an offence under s 3(a)(i) of the Prevention of Corruption Act 1961 and two other offences under s 4(a) of the same Act. In the course of the prosecution's case, the investigating officer ('IO') produced a list (P7) bearing the numbers of all the trap notes recovered from the appellant's pocket. The IO had received this list from another officer, Lai. Counsel for the appellant objected to the production of P7 contending that as Lai was not called but merely made available to the defence, the list was inadmissible as it is hearsay evidence. The trial judge disagreed but exercised his power under s 425 of the Criminal Procedure Code (FMS Cap 6) ('CPC') to call for Lai's evidence, to which the appellant's counsel also objected. In this appeal against his conviction for the third offence under s 4(a), the issues raised are first, whether P7 was inadmissible as being hearsay evidence and secondly, whether the learned sessions court judge was empowered under the circumstances to exercise his power under s 425 of the CPC.

Held, dismissing the appeal:

(1) The mere deed of composing, framing, ascribing, or preparing a document or reducing certain details into writing, does not ipso facto turn the writer into the maker of a document within the contemplation of the hearsay rule.

(2) The affirming person for whose purpose or on whose behalf the averments contained in the documents are made is the actual maker of the document. Exhibit P7 is a mere acknowledgment and receipt between the IO and the complainant and Lai is merely the person who assisted in the preparation of the acknowledgment and receipt.

(3) The trial judge had considered it essential in order to arrive at a just decision to call for the formal evidence of Lai, which he was entitled to do and bound to do so under s 425 of the CPC.

Cases referred to

1 *Ramli bin Kechik* v *PP* [1986] 2 MLJ 33 (refd)
2 *Abdul Munim Khan* v *The State of Hyderabad* AIR 1953 Hyd 145 (refd)
3 *PP* v *Phon Nam* [1988] 3 MLJ 415 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 425

Abdul Rashid bin Sudin for the Public Prosecutor.
S Selvarajah for the appellant.

Cur Adv Vult

Wan Yahya J: The appellant was tried before the sessions court for an offence under s 3(a)(i) of the Prevention of Corruption Act 1961 and two other offences under s 4(a) of the same Act. He was acquitted in respect of the first two charges and convicted for the third offence under s 4(a) of the Act against which he now appeals.

In the course of the prosecution's case the IO produced a list (P7) bearing the numbers of all the trap notes recovered from the accused's pocket. According to the IO he had obtained these notes earlier from another officer Lai Ping Cheong together with a prepared list containing these numbers in the following form:

Senarai wang bertanda berjumlah $2,500 RPT Polis Balai Ampang 10347/85:

24 keping Not $50 bersiri

1	VJ 9819061	13	VJ 9819074
2	VJ 9819062	14	VJ 9819075
3	VJ 9819064	15	VJ 9819076
4	VJ 9819065	16	VJ 9819077
5	VJ 9819066	17	VJ 9819078
6	VJ 9819067	18	VJ 9819079
7	VJ 9819068	19	VJ 9819080
8	VJ 9819069	20	VH 9337282
9	VJ 9819070	21	VK 1063190
10	VJ 9819071	22	VK 4239073
11	VJ 9819072	23	VK 4239074
12	VJ 9819073	24	WA 0517883

8 keping Not $100 bersiri:

1	ZA 4043876	5	ZC 4032695
2	ZB 1453958	6	ZC 4032697
3	ZC 4308791	7	ZC 3430371
4	ZC 6244990	8	ZC 6526610

1 keping Not $500 bersiri:

1 ZV 0628776

Saya telah menyemak wang dari pocket kiri baju saya dan telah disemak dengan senarai wang bertanda dan didapati adalah betul.

?
2.45 hrs 5 Oktober 1985

Tandatangan Penerima.
5 Oktober 1985

Tandatangan Penyerah.
5 Oktober 1985

Tandatangan Saksi.
5 Oktober

On receipt of these items he had compared the numbers on the prepared list with the notes and having found the notes to be correlative with the numbers on the list, he had signed the list as the person who handed over or delivered the money and the complainant also signed as the receiver of these notes. In addition there also appeared the signature of a witness.

Counsel for the appellant objected to the production of P7 contending that as Lai Peng Cheong was not called but merely made available to the defence, the list was inadmissible by virtue of the rule against heresay evidence.

The learned sessions judge disagreed with this submission but nevertheless exercised his power under s 425 of the CPC to call for Lai Peng Cheong's evidence. The appellant likewise objected to what he contends as the court's usurpation of the prosecution's power. He maintains that without calling for the evidence of Lai Peng Cheong whom he argued to be the maker of the list, P7 could not have been admitted and in the absence of this piece of evidence the prosecution would not have been in a position to prove that the trap notes were the actual ones found in the appellant's pocket.

The two contentious issues raised in this appeal therefore rest on two questions: first, whether P7 was inadmissable as being hearsay evidence, and secondly, whether the learned sessions judge was empowered under the circumstances to exercise his power under s 425 of the CPC.

The answer to the first issue can best be seen by examining the nature and purpose of preparing P7. The evidence as recorded by the learned sessions judge shows that Lai Peng Cheong had handed over to PW5, the IO, a prepared typewritten sheet bearing the serial numbers of all the trap notes. It is not known whether he typed the list himself or that he had asked a typist to do so. The document was entitled list of marked money amounting to $2,500 followed by the Report No 10347/85. Then following that, under separate denomination of the $50, $100 and $500 notes, were the serial numbers of each note. At the bottom there appears in the spaces provided the signature of the IO as the person who delivered the money, the complainant as the receiver of the same and an unidentified witness. There was no signature of Lai Peng Cheong on the document. Even at a glance it is obvious to me that this document was nothing more than an acknowledgment by the IO to the effect that he had delivered the notes which serial numbers appeared on the list and a similar acknowledgment from the complainant that he had received that money. By comparing the unsigned list against the notes and then signing the same, the IO had in effect authenticated and endorsed the unsigned P7 as his own document. After all he was the person who compared the notes and could vouch for the correctness of the numbers that had been inscribed and he had authenticated the list by setting down his signature on it and not

Lai Peng Cheong. Likewise the complainant, by signing as a receiver of the document, had adopted the same as his letter of acknowledgment or his receipt.

The mere deed of composing, framing, ascribing, or preparing a document or reducing certain details into writing, does not *ipso facto* turn the writer into the maker of a document within the contemplation of the hearsay rule. In my opinion, the affirming person for whose purpose or on whose behalf the averments contained in the documents are made is the actual maker of the document. The petition writer, typist or even a lawyer who prepares a document for his client is not himself a maker but is the person who assists in the preparation of the document. The maker is the person who authenticates the document. Exhibit P7 to my mind is a mere acknowledgment and receipt between the IO and the complainant and Lai Peng Cheong is merely the person who assists in the preparation of the acknowledgment and receipt. The exhibit was therefore admissible in evidence.

The second question to be considered is assuming that P7 was inadmissible, was the learned sessions court judge right in invoking s 425 to call for the witness after the close of the prosecution's case? Counsel sought to distinguish the Supreme Court case of *Ramli bin Kechik* v *PP*[1] by reference to a passage at p 34F (right column) which he contends was taken from *Abdul Munim Khan* v *The State of Hyderabad.*[2] The passage of our Supreme Court judgment which appears in normal prints below reads:

> ... The object of the section is just as much the prevention of escape of a guilty person through some carelessness of the prosecution or the magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of one party. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the court would be justified in exercising its discretion in calling for additional evidence...
>
> *'It is not desirable to allow the prosecution to patch up the evidence wanting in the case. Negligence on the part of the prosecution can never be a ground for taking additional evidence against the accused and by allowing such additional evidence, surely, justice would fail.'*

It is the contention of counsel that had the Supreme Court gone on to reproduce further the Hyderabad judgment in italics, above, it would have shown that the invoking of s 425 to make out a gap in the prosecution's case would result in failure of justice.

With respect, I do not think that ratiocination is correct. It is obvious that the part of the Hyderabad court judgment had been deliberately avoided in *Ramli Kechik*'s case[1] because that dicta did not find favour with our Supreme Court interpretation of s 425. This subject and *Ramli Kechik*'s case[1] were again considered by the Supreme Court in *PP* v *Phon Nam*[3] in which the court held that the trial judge had failed to exercise his discretion properly when he refused to admit further evidence under s 425 to confirm the endorsement made on certain exhibits.

Defence counsel once again sought to circumscribe this case by reference to the words 'utmost circumspection' in the passage at p 416 right column H which appears as follows:

> Section 425 of the Criminal Procedure Code is clearly divided into two limbs; first, a discretionary provision which provides that the court may, on an application, summon any person as a witness or recall and re-examine any person already examined at any stage of any inquiry, trial or other proceeding under the Code. In exercising the discretion under the first limb, the court clearly must proceed with utmost circumspection especially when there was likelihood of the fresh evidence proving to be prejudicial to the accused. Secondly, an imperative provision which requires the court to do so where the court is satisfied that the evidence to be summoned would appear to the court to be essential to a just decision of the case....

In that paragraph, the learned Lord President was elucidating the discretionary and imperative limbs of s 425 and his admonition on utmost circumspection clearly refers to the first limb but not on the imperative provision where the court considers the fresh evidence to be essential to a just decision.

The learned sessions judge in our present case, before resorting to s 425 of the CPC, recorded the following remarks:

> Omission by prosecution to call the maker of P7 is a mere technical error. In the interest of justice and for the just decision of this case, the court, on the authority of *Ramli bin Kechik* [1986] 2 MLJ 33 and the process conferred under s 425 of the CPC now describe that the maker of P7 should be called to testify and clarify the same.

It is apparent to me from the above expression that the learned sessions judge had considered it essential in order to arrive at a just decision to call for the formal evidence by Lai Beng Cheong which the learned judge was entitled and indeed bound to do so under that provision of the Criminal Procedure Code (FMS Cap 6).

The role of a judge in our adversarial system of justice has often been misunderstood. Although depicted symbolically as a blindfolded lady balancing the scales of justice, a judge should not be completely oblivious to the surrounding events at the trial affecting his assessment of a case. It is true that he must not load onto any side of the scales extrinsic evidence but he certainly owes a duty to take onto the scales formal evidence which, although available and alluded to, was inadvertently left out by either party. Consequently, and in reiteration of my earlier finding on the first issue, I would hold that P7 was admissible in evidence and even if it was not so, the learned sessions judge had exercised his power properly in calling for further evidence under s 425 of the CPC. I therefore dismiss the appeal against conviction.

As for the sentence, the learned deputy public prosecutor had moved the court to enhance the punishment. I observe that the learned sessions court judge has not only been unusually fair in acquitting the appellant of two other related charges but he was also unduly lenient when inflicting the prescribed punishment. However, this act of compassion and sympathy by the learned sessions court judge was founded only on the sole consideration that the appellant was a first offender. In conceiving so he probably overlooked that in cases of corruption, particularly by a government servant, there is no question of an offender having a second bite at the cake.

I do not intend here to add to the long list of authorities on the gravity of corruption cases where the prescriptive punishment for the offence had been held to be a custodial sentence. However, like the learned sessions court judge, I am inclined to lean on the side of compassion not because this is his first offence but having regard to the loss of long service and his pension and gratuity. Nevertheless, a figure of $5,000 for a bribe of $2,500 is certainly too light a punishment. I will therefore enhance the figure of $5,000 to $7,500, in default 2 years' imprisonment.

Now turning back to the order of acquittal on the first two charges, the learned sessions court judge gave several unelaborated reasons for doing so. Essentially he was reluctant to act on the uncorroborated evidence of the complainant whom he had found to be incoherent and shifty in his evidence. The learned deputy public prosecutor argued that the learned sessions court judge should have nevertheless accepted this witness's evidence as not being inherently incredible and called for the defence. Having read the notes of evidence as recorded, I find myself not only entirely in agreement with the trial judges' findings, but also in the course of such perusal, I came across the confirmatory evidence which gave rise to his doubts. Even with the use of an aid memo, admitted in evidence in the form of his personal diary, the complainant faltered in his evidence and on one occasion had to correct his earlier testimony. However, the most crucial reason, which incidentally was not taken up by the defence, is that a person simply referred to as Ah Ming whom the complainant insisted was present with him on both occasions and therefore had heard and witnessed the transactions involving both charges was neither called or offerred to the defence. The question whether evidence is inherently incredible or not is a question of fact and in this case I think the learned sessions court judge had every reason to hold it positively so. I therefore dismiss the cross appeal against acquittal on the first and second charges.

Appeal dismissed.

Solicitors: *Fernandez & Co.*

Reported by *Zarinah Marican*

Teh Hock Seng v Minister of Home Affairs & Anor

HIGH COURT (PENANG) — CRIMINAL APPLICATION NO 44-52-90
ABDUL HAMID JC
25 MAY 1990

Preventive Detention — Confirmation of detention by Yang di-Pertuan Agung — Whether must be made within reasonable time — Procedural requirement for Yang di-Pertuan Agung to give directions to minister — Dangerous Drugs (Special Preventive Measures) Act 1985, ss 10(2) & 11C(1)

Pursuant to a detention order made under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985, the applicant was ordered to be detained for two years from 31 May 1988. The applicant made representations to the Advisory Board in June 1988 and in August the Board heard these representations. On 2 September 1989, the Board made its recommendations to the Yang di-Pertuan Agung, who then 'confirmed' the detention order as provided by s 10(2) of the Act. The applicant sought habeas corpus on the ground that the confirmation was not made within a reasonable time. There was no indication in the affidavits filed on behalf of the respondents as to when such confirmation was given.

Held, dismissing the application:

The two procedural requirements provided by s 10 of the Act have been complied with. Subsection 2 of s 10, which provides for the Yang di-Pertuan Agung to give directions to the minister, as he thinks fit, does not lay down any procedural requirement as to how or when the direction is to or should be made. The question of non-compliance does not arise. It is not a procedural requirement in the Act that the direction, if given, must be given within a reasonable time.

Case referred to

1 *Rajoo s/o Ramasamy* v *Inspector General of Police & Ors* [1990] 1 MLJ 430 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 10(2), 11C(1)
Interpretation Act 1948 and 1967 (Act 380) s 54(2)

Karpal Singh for the applicant.
Noorbahari bin Baharuddin (Federal Counsel) for the respondents.

Cur Adv Vult

Abdul Hamid JC: The applicant was arrested and detained under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316) on 2 April 1988. On 27 May 1988 the Deputy Minister of Home Affairs made the detention order pursuant to s 6(1) of the Act ordering the applicant to be detained for two years from 31 May 1988. On 9 June 1988 the Advisory Board received the representations made by the applicant under s 9(1) of the Act. The Advisory Board heard the representations on 24 August 1988. On 2 September the Advisory Board made its recommendations to the Yang di-Pertuan Agung. The Yang di-Pertuan Agung 'confirmed' the detention order as provided by s 10(2) of the Act. However, there is